· 3 - 1169

FILED
MAR 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE ..... *Petitioners*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF
FOR PETITIONERS

FRANKLIN WILDER
Counsel for Petitioners
715 First Nat'l Bank Bldg.
Fort Smith, Arkansas 72901

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CLAUDE EARL FLAHERTY AND
GENE WHIPPLE ..... *Petitioners*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

REPLY TO BRIEF
OF RESPONDENT

I.

Petitioners respectfully deny that the tape recordings introduced in this case were merely physical evidence supporting the officers testimony.

The recording equipment and electronic devices to tape the phone calls were brought to the Flaherty home delib-

erately to establish a "smoke screen" of betting, when in fact there was none. The tapes were introduced in evidence, and played to the jury in regard to these alleged bets, *as independent evidence*. The officer *did not testify independently* as to these bets being accepted by him. The tapes were played as evidence of the actual conversations taking place, and this is *all the evidence* that was introduced as to these alleged bets taken over the telephone. (R. 206-224)

At the conclusion of these tapes being played, exceptions being saved, mistrial being requested and denied, and exceptions saved, the *officer then stated,* "I have no idea who I was talking to over the phone during any of the foregoing conversations." (R. 228)

2.

Respondent claims that the *Lee vs Florida, 392 U.S. 378,* case does not apply, because the Flaherty telephone was already installed. This statement borders on the ridiculous. In all these cases a telephone has already been installed. The point of this case is, that the *officers installed electronic devices* to the Flaherty phone without permission, and then proceeded to *tape the calls,* and then *introduced the calls in evidence* without consent from the caller or the person to whom the calls were intended . . . *the owner of the telephone,* (the Petitioner who was being impersonated by said officer.)

3.

Respondents say that the Petitioners conceded that the Police were invited to enter the Flaherty home. *Petitioners do not concede* that the Police were invited to intercept phone calls in violation of the Federal law, were not invited to arrest the Petitioners without a warrant, were not invited to search the house, and were not invited to impersonate these Petitioners.

4.

Respondents state that the act of the Police in answering the telephone had nothing to do with the search warrant, and therefore, *Coolidge vs New Hampshire, 403 U.S. 443,* does not apply.

Actually, this very fact that the Police were not authorized by the warrant to answer the telephone, tape calls, intercept calls, intercept messages is one of the main objections that Petitioners have in this case. Also, this is exactly why *Coolidge vs New Hamphire* does apply, because the *officers knew in advance* that they were going to the Flaherty home for the express purpose of holding the Petitioners under arrest while they impersonated them, and answered the telephone and taped the calls.

CONCLUSION

For the foregoing reasons it is respectfully suggested that the Argument of the Respondents should have no effect on the Petition filed in this case, and that said Petition should be granted in accordance with our original request.

Respectfully Submitted,

FRANKLIN WILDER

715 First National Bank Bldg.
Fort Smith, Arkansas 72901

Counsel for Petitioners